Colloquy

The whole point here, as I understand it, is that Mr. Fennelly is claiming that in addition to the income which is now in the schedules for 1941, the Government has said to this defendant, "Why, you had"—what was it, $12,000? or whatever it was—

Mr. Fennelly: It will amount to about $290,000.

The Court: But whatever it is, "that you had some income in 1941 in excess of what you reported. We are going to put a tax on you for it."

If the Government in one place claims there was income beyond what was reported, it seems to me that has to be the Government's position all the way through thereafter.

Mr. Pierpoint: Well, your Honor, the problem arises because those assessments—the Government saying, "It was income which you didn't report"—are based on (1881) expenditures. That is where the Government gets its information, that there was income in excess.

Now, those expenditures were ones that, because of the different standards of proof in civil and criminal litigation, that we weren't able to prove here, but the assessments of additional tax are based on nothing but expenditures by the defendant.

The Court: That is how you arrived at it, but isn't it a fact that there came a time when the taxpayer and the Government agreed that there was additional income and that the taxpayer paid a tax on that?

Mr. MacMahon: Oh, no, no.

Mr. Pierpoint: No, that is not done at all.

Mr. MacMahon: May I just say a word? The point is that the over-assessment is not one reached by agreement.

The Court: I don't hear you.

Mr. MacMahon: It is not reached by an agreement, your Honor. It is one made by the Government on the basis of expenditures, unreported income—

The Court: Isn't agreement reached when the taxpayer ceases to litigate and pays?

Mr. MacMahon: He hasn't ceased litigating. He is litigating it very vigorously at this moment.

(1882) Mr. MacMahon: In the Tax Court. And the point is that this money, this unreported income, a la these civil proceedings here would not be available to spend, your Honor, and it is not unreported income he can stick in his pocket and use to explain away these expenditures here. It is money he had consumed; he had spent it. And it is different in the proof in the civil case, where your burden of proof is nothing like what it is in the criminal case, where you can make all kinds of estimates that aren't open to you here; that you can spend there, that you can spend there a great deal more money than you can here in this criminal court.

Therefore, any inference that Mr. Fennelly seeks to establish here that this unreported income, as per the civil litigation, was money available to his client to spend just isn't in accordance with the facts, your Honor.

If we are going into that, it is our position and we should be able to go into it all the way.

The Court: I would be inclined on what I have heard now to disagree with you on that, but since the tax was not paid, I think that may raise another question.

Mr. MacMahon: The tax was not paid.

(1883) Mr. Pierpoint: There is a verified petition in the Tax Court denying these assessments.

Colloquy

Mr. Fennelly: The fact of the assessment, your Honor, is the same—

The Court: I don't hear you.

Mr. Fennelly: The fact of an assessment by the Government is an assertion by the Government that you have had that amount of income and it is prima facie proof in fact.

The Court: Prima facie proof of the fact of the assertion?

Mr. Fennelly: No, of the fact of income, and the burden is on the taxpayer to upset it; and the Government cannot take a position in one place and say you have had this income and then seek to take a contrary position.

Mr. Pierpoint: Your Honor, I would like to correct just one statement by Mr. Fennelly.

The burden is not on the taxpayer in a fraud case, and these are fraud cases in the tax—

Mr. Fennelly: There is no incorrect statement on my part. The burden, as a matter of law, is not on the issue of fraud, but on the issue of tax.

The Court: The difficulty I face, Mr. MacMahon, is that according to what has been developed (1884) here now, and I suppose the record does show that this is all going on out of the hearing of the jury, that in one court the Government is asserting that this defendant had an income of X dollars over what he reported in the year 1941, and that in this court and in this case it is asserting that he only had the income he reported.

Mr. MacMahon: No, your Honor.

Mr. Pierpoint: The point is that the statement about his income with respect to these prior years is based on expenditures, expenditures pure and simple, so that there can be no inference from the

Government's assertion with respect to the prior years that there was any money unreported as income in prior years available for spending during the prosecution years because, by definition, the money was spent.

The Court: That is not the point. The point is that the Government's burden in this type of case is to fix the net worth as of January 1, 1946.

Mr. Pierpoint: Yes, your Honor.

The Court: And you have undertaken to do that by beginning in 1937 and fixing the net worth then and then building up from there.

Now, is it not relevant in that period, and that is the point that I take is the thrust of (1885) this examination by Mr. Fennelly, is it not relevant that in 1941, one of those base years, we will call it, that the Government claims that the defendant had income of X dollars in excess of what he reported?

Mr. Pierpoint: Yes.

The Court: And that here you are taking into consideration only what he reported.

Mr. Pierpoint: Yes, your Honor, but, you see, the Government also claims that he ~~spent all that~~ additional income. That is—

The Court: What is that?

Mr. MacMahon: Your Honor—

The Court: Just a minute, please. I can't answer two of you at the same time and I can't listen to questions from more than one at the same time. You make your choice as to who is going to make the argument, and I will do my best to consider it.

Mr. Pierpoint: Your Honor, I might also point out that during the pre-prosecution years, from 1937 up to December 31, 1945, we claim that he had unreported income in this very case, Government's Exhibit 362 in evidence; that final figure there is

unreported income; it is investments and expenditures made by the defendant in excess of his reported income.

(1886) Now, these civil assessments were based on expenditures that could be proved civilly in excess of that figure, in excess of the figure that we show in this case. That is the entire basis for the civil assessments, is that civilly the Government is able to show that that money was spent.

The Court: Let us assume for the sake of argument that this civil litigation had been terminated or that the defendant had acquiesced in the assessment and paid the tax. Would you still contend that whatever that additional income assessed was, was irrelevant here?

Mr. Pierpoint: To this extent, your Honor—

The Court: Well, to any extent. First, tell me whether you would to any extent.

Mr. Pierpoint: This assessment—

The Court: Will you please answer my question, Mr. Pierpoint? Would you or would you not consider it relevant?

Mr. Pierpoint: No, sir, I would not.

The Court: Very well.

Mr. Pierpoint: In the circumstances under which the assessment was made, that is to say, when the assessment is made on the basis of the net worth expenditure method; in other words, the way you determine (1887) how much the tax was, or how much the income was, was by spending the money.

The Court: Well, then, if I understand your argument, it is what I suggested before—it comes down to this: That in a civil court the Government can take one position and that at precisely the same time they can come into a criminal case and take a different one.

Colloquy

Mr. Pierpoint: Your Honor, the position is not contrary; it is just that we can't because of the different—

The Court: Well, is it different?

Mr. Pierpoint: It is different because of the standards in proof in the civil case and in a criminal case, your Honor.

Mr. MacMahon: The different is in amount.

The Court: Now, Mr. MacMahon has something to say, and I am going to hear you, Mr. MacMahon.

Mr. MacMahon: Well, your Honor, the only difference is in amount. In the criminal case—

The Court: I know, but the amount is immensely important here, is it not?

Mr. MacMahon: Well, your Honor, the concept here is that he has spent over and above his reported income. That is the same concept, both civilly and criminally.

(1888) The Court: That is true. But just one minute. Before you go into it, I want you to see what the problem is in my mind because I am hoping for enlightenment.

The Government has charged here that in 1946, '47, '48 and '49 this defendant understated his income by so much in each year.

Mr. MacMahon: That is right.

The Court: Now, you haven't undertaken to show that he got a particular number of thousands of dollars in any one of those years. You do it by saying, beginning from 1937 up to January 1, 1946, we consider all of his financial transactions and we arrive at a figure which we say represents what his net worth was on January 1, 1946. That is your starting figure.

Mr. MacMahon: That is partially correct, your Honor—partially.

Colloquy

The Court: Well, in what part is it incorrect?

Mr. MacMahon: Plus what he spent during that period.

The Court: Well, did I say his financial transactions? Did you suppose that I meant only his savings?

Mr. MacMahon: You said, your Honor, his assets.

(1889) The Court: His financial transactions is what I said. I am quite sure that I didn't even mention the word "assets." I am quite sure what I am talking about.

Mr. MacMahon: I may have misunderstood, your Honor.

The Court: You start in 1937 and you go up to January 1, 1946, and you show his financial transactions, as a result of which you distill, so to speak, a figure which you claim represents then his net worth.

Mr. MacMahon: That is right, your Honor.

The Court: Now, what I am trying to ascertain is whether or not it is not highly relevant whether his income in 1946 was what he reported, or is it not the figure which the Government in a civil case says he should have reported?

Mr. MacMahon: Your Honor, if I may go back just a little—I am not ducking your question—

The Court: I don't think you are, no. I think we just had a misunderstanding as to words.

Mr. MacMahon: We went from '37 up to the beginning of 1946 to find out what he was worth, as your Honor has said.

But, in addition to that, your Honor, we proved what he spent from '37 to '46, and that figure (1890) is some hundred and eighty-five thousand dollars over and above what was reported during that period of time, and it was spent—it was proved by his having spent the money.

Colloquy

Therefore, that money is unavailable to spend during the prosecution years, it was consumed.

Now, in the civil case that is exactly the same position. The only difference is that in the civil litigation, your Honor, the amount of those expenditures and, therefore, consumed unreported income, is much greater than it is here in the criminal case. The reason for that, your Honor, as was pointed out, is the difference in the degree of proof in the civil case and in the criminal case.

So—

The Court: Well, then, am I correct in this, that in the method of computation you used here, you have taken into consideration only some of the defendant's expenditures?

Mr. MacMahon: Precisely.

The Court: Whereas in the civil case you take into consideration a larger sum?

Mr. MacMahon: Exactly, your Honor. May I illustrate?

In 1946, for example, here our proof shows (1891) that he spent $8.41 for food. That is all we were able to drag out on that witness stand.

Now, in a civil case, the assessments, based on cost of living for a man and his wife, would go in and that figure is probably three or four thousand, at least, in that year. There are other instances like that. The telephone bill. The only year we were able to prove up to the penny was 1949, where we proved some $450.

The Court: All right. I see the thrust of it. But let me ask you this question: If you were to allow in this case, or take into consideration in this case the amount of expenditures in the base period 1937 to 1945 as you do in the civil case, would the

net worth on January 1, 1946, be the same as it is now?

Mr. MacMahon: The net worth would your Honor, yes, exactly.

The Court: What do you say to that, Mr. Fennelly?

Mr. Fennelly: I will demonstrate, I believe, that it will be very different, on the basis of the Government's assessment on income.

The Court: Well, will you make an offer of proof, and undertake to do that out of the hearing of (1892) the jury, so that I may weigh that?

Mr. Fennelly: Yes. I will offer to prove that on the assessment--

The Court: I don't mean any general offer of proof. I know you have already suggested that. But will you make your demonstration, or show me in some detail how you propose to do that?

Mr. Fennelly: Yes, your Honor. The assessment of additional income to Mr. Costello for the year 1941 was $19,116.28.

Mr. Leath, I wonder if you would be good enough to add these for us? Would you?

The Witness: Is that $19,116.28?

Mr. Fennelly: That was $19,116.28.

1942, $17,134.47.

For the year 1943, $55,670.03.

For the year 1944, $120,945.45.

For the year 1945, $79,698.02.

The Witness: $292,000—

The Court: I can't hear you.

The Witness: $292,564.25.

Mr. Fennelly: Now, you see, if you take that figure, your Honor, and add it on Exhibit 362 to the gross income reported by Frank Costello, which is

$269,516.87, then on this schedule Mr. Leath had (1893) deducted from an item which was $472,382.68, which was the total investments and expenditures less non-taxable receipts, less the gross income of Loretta Costello, which totaled $472,382.69.

Now, if you deduct that from the figure that I have, which brings you over with $89,698.43 minus as against a figure of investments and expenditures of Frank Costello in excess of his reported gross income—you see on their schedule they have $202,865.81.

The Court: This is 362 you are talking about?

Mr. Fennelly: 362, the last figure.

The Court: Yes?

Mr. Fennelly: And on this computation that should be minus $89,698.43. In other words, it removes entirely the Government's figure.

Mr. MacMahon: Your Honor, I think this is a little Chinese arithmetic here.

Mr. Fennelly: It couldn't be simpler.

The Court: Try it with some Irish-American arithmetic, will you, because that is the only kind I understand.

Mr. MacMahon: If you subtract these out, you have got to put those expenditures in at the top, and if you put the expenditures in on the basis of the civil suit, then you come out with exactly the same (1894) answer.

The Court: Why isn't that pretty good, according to that last method of arithmetic, Mr. Fennelly?

Mr. Fennelly: The expenditures are in there.

Mr. MacMahon: They are not.

The Court: No; the Government says they are not. The Government says they have excluded a

very substantial part of the expenditures which we used in the civil case to arrive at the figures which you have—

Mr. Fennelly: Your Honor, I am not talking about a civil case. We have been assessed, and assessment is the same as a judgment. The burden on us would be to show, anywhere, that it wasn't so, but it stands as a judgment. The Government cannot take that position to now say something different. They have shown in this case all of the expenditures they could prove, and that is in the calculation that I have already asked Mr. Leath to make, and that appears on Exhibit 362. And what I say is that we then come over for each of these years until December 31, 1945, with a certain accumulation of income which the Government has charged us with.

Mr. MacMahon: Your Honor, you cannot accumulate something you spend. You can't; it is consumed. It is a method I would like to learn.

(1895) The Court: Well, it is the contradiction that is confusing. You can't assess a man with income unless he had it.

Mr. MacMahon: Yes, your Honor.

The Court: And if you say in one place that this is what he had in another place, it seems to me you have to do the same thing, unless there is some grave reason why not. But bear in mind you are talking to somebody who lays no claim to being an accountant.

Mr. MacMahon: Nor I, your Honor.

The Court: Well, that is going to be the blind leading the blind. And I suggest now that instead of you and I arguing about this, you take this expert and ask him some questions and see how he explains it to us.

Mr. MacMahon: All right, your Honor.

The Court: Or any other expert you want. I don't care. I am not being facetious about it. It does seem to me that it is odd, it just seems odd to me that the Government can take one position one place and the contrary in another.

Mr. MacMahon: Well, your Honor, the problem is that our position is not one position in one place and a contrary one in another. It is not that.

(1896) The Court: Well, you see, my deficiency extends beyond mathematics, because I don't see that either.

Mr. MacMahon: Your Honor, I can shorten this by asking the expert:

By Mr. MacMahon:

Q. Whether the net worth would be any different if he made the expenditures shown on these assessment sheets for the years—what is it—1942 through—1941 through 1946 than it is on your computation? A. Through '45, I believe.

Q. Yes, through 1945. A. No.

Q. Now, would you explain why to his Honor, why that is? A. Sir, these expenditures that everybody has been talking about are the total expenditures made by the taxpayer during the year, a portion of which have been proved in this case. The larger portion has been made part of the civil case.

The Court: What he eliminated here.

The Witness: Eliminated here.

Now, based on the larger expenditures, certain assessments were made for the years '41 through 1945. Now, those assessments, in effect, compare with the additional tax that would be alleged in a case of this type and are all part of the same case,

the only (1897) difference being that the amount of proof in this case, in dollars and cents, is less than it is under the assessment Mr. Fennelly is speaking of.

Q. You mean the expenditures on the civil assessments are greater for the same period than those proved here, is that right, Mr. Leath? A. That is correct, yes.

Q. And those greater expenditures would not increase or affect his net worth as of the beginning of 1946; is that correct? A. No, sir, it could not, because the money has been spent.

Q. In consumables? A. Yes.

Q. And not in the form of these investments that are shown as his net worth in 1946, is that right? A. That is right, yes.

By Mr. Fennelly:

Q. There is no proof as to what these expenditures, under the assessments, were for? A. Well, I think— (to the Court). May I answer?

The Court: Yes.

A. Mr. Fennelly, the point would be that certain moneys were expended during the period '41 through '45 for either items of normal expenditure or for investment. Now, once that is done, the money is gone.

(1898) Q. The source of that money you would not know? A. Well, that is why we are using this theory.

Q. Except for a hypothesis upon which you predicate your opinion; right? A. Well—

Q. Is that right? A. They are pretty big words, but I think you are right.

Colloquy

The Court: Oh, you are not frightened by "hypothesis."

The Witness: No.

The Court: As an accountant, you must use that often.

Well, now, let us get away from all the side play because the man that needs enlightenment hasn't been enlightened.

Mr. Fennelly: My proposition is very simple, that the Government has made an assessment—

The Court: Well, that is a self-serving declaration, because it is not simple to me.

Mr. Fennelly: Well, the Government has made an assessment, and the assessment is the same as a judgment, prima facie proof of the fact that Mr. Costello had this income. If he had the income we are entitled to show the figures in arriving at the amount on December 31, 1945.

The Court: (To the witness) Yes?

(1899) The Witness: Sir, I believe that Mr. Fennelly's point is that these additional moneys would be available and on hand as of January 1, 1946.

Mr. Fennelly: My proposition is simply to show your figures are not correct on a basis of the Government's own assertion, unless the Government claims now that their assessment is incorrect.

Mr. MacMahon: Your Honor, we would be happy to amend our schedule to add in all of these civil expenditures during this period and then let Mr. Fennelly proceed. If we are going to put them in at one end, let us put them in at the other. We would be more than happy to do it during the prosecution.

The Court: Would you like the whole apple or just half of it?

Mr. Fennelly: No, I will have what the Government binds us by, which is their assessment.

Mr. MacMahon: Well, these assessments run through—

The Court: Before we do anything else: Mr. Clerk?

The Clerk: Yes, sir.

The Court: Will you go out and inform the jury that they are excused until 10.30 tomorrow morning?

(1900) The Court: It seems pretty clear, Mr. Fennelly, that you are going to get a distortion by the process you suggest.

Mr. Fennelly: Judge, it is exactly the same to me as if someone went out and got a judgment against someone for so many dollars. They might or might not have been liable for the money. The fact is you have a judgment, which is a binding adjudication on them. And in this instance the burden is on the taxpayer to upset the fact of that liability.

The Court: That may be so.

Mr. Fennelly: Now, the Government has asserted that, and I say that the Government, as far as this case is concerned, is bound by that assessment, and we have a right to use the very same figures which they assert were our income, Mr. Costello's income, Mrs. Costello's income, for 1941 through 1945, in arriving at the figures with which we begin the 1946 period.

The Court: I would think there might be something to that if the assessment had been contested. I am not sure that that is not necessarily so where the assessment is to be contested and may result in a decision that the assessment was in error.

Mr. Fennelly: The burden, as far as the fact (1901) of assessment, is on the taxpayer to disprove.

The Court: I don't think that makes the difference. There still remains the possibility that the

assessment may be completely set aside or at least partially set aside.

Mr. Fennelly: It isn't at this time.

The Court: No, but you are asking to introduce here a figure which may turn out to be completely wrong, or may turn out to be completely non-existent.

Mr. Fennelly: That is so with the figures in this indictment.

The Court: That remains to be seen, and you will have your opportunity to do that, and it will be done here.

Mr. MacMahon: That is the issue.

The Court: But the correction or dissipation of the assessments for 1941, '42 and '43, is a matter over which we have no control at all.

Well, it looks like I have something to think about for the rest of the afternoon.

Mr. MacMahon: Your Honor, simply stated, our point is that these civil assessments are based on expenditures. The money was consumed. It doesn't matter how much he unreported there because that money is not available to spend in these prosecution (1902) years, and if we—

The Court: Your point really comes to this: If those are going to be put in here, the expenditures on which they were based ought to be put in, but that you cannot do it because of the problem of proof.

Mr. MacMahon: Precisely right, and for the pre-prosecution years, then, we have to go all the way through, through the prosecution years as well.

The Court: One step at a time.

Mr. MacMahon: You see, that follows, your Honor, because if you build up on Mr. Fennelly's theory—

The Court: I am not following you at all. I am

having enough trouble with the starting point. Let me worry over that.

If there are any problems to be raised, you may pay Mr. Fennelly the compliment of assuring him that we expect him to raise them.

All right. Ten-thirty tomorrow morning.

Mr. MacMahon: May the Government hand up its memorandum in opposition to the motion for judgment of acquittal?

The Court: Yes. And you have a copy for the defendant?

Mr. MacMahon: Yes. And in opposition to the motion to dismiss the indictment, and a copy of the (1903) Government's requests to charge.

The Court: Well, thank you very much. I really have plenty now.

Mr. MacMahon: Copies of the memorandum have been handed, but not the requests to charge, have been handed to Mr. Fennelly.

The Court: That is right; in accordance with Mr. Fennelly's agreement of yesterday.

You don't expect the Government's requests until you are ready to submit your own?

Mr. Fennelly: That is right. We will try to have ours to you as quickly as possible. We are working on them.

The Court: Very well. Thank you.

(Adjourned to May 6, 1954, at 10.30 a.m.)

Wilfred T. Leath—for Government—by the Court

(1904) New York, May 6, 1954;
10.30 o'clock a.m.

Trial resumed.

(Jury not present.)

The Clerk: If there are any witnesses present in the courtroom at this time, they will please retire to the witness room.

The Court: Mr. Leath, will you take the stand.

WILFRED T. LEATH resumed.

By the Court:

Q. You testified yesterday in the hearing out of the presence of the jury, Mr. Leath, that the net worth of the defendant in this case would not be changed even if you had taken the income as claimed by the Government in the civil case? A. Yes.

Q. Does that figure of $202,865.81, which appears on schedule 362, have any bearing on that? That last figure. A. Would it have any bearing on the net worth—

Q. On the fact that the net worth would be no different? A. It has this bearing, sir, that this (1905) figure of $202,000 would be increased due to the fact—I am not quite sure, your Honor, I fully understand your question now.

Q. Well—

Mr. Fennelly: Could I just ask you? I didn't quite get the import of your original question of the

witness as to what he testified yesterday. May I have it read back?

The Court: I think the witness testified yesterday, in answer to a question by Mr. MacMahon, that even though the additional income which you think—which you say the Government is claiming the defendant had in the year 1941, if it had been taken into consideration here, and the same additional income for the other years 1941 through 1945, that the net result would be that the net worth on January 1, 1946 would be no different than it is on the schedules here submitted. The witness said that.

Mr. Fennelly: He did say that?

The Court: I understood him to say so.

Did you not?

The Witness: Yes.

Mr. Fennelly: Then I would examine him on that subject when your Honor is finished.

The Court: And I am trying to find out whether (1906) or not this figure which is described as investments and expenditures of Frank Costello in excess of his reported gross income in the period from 1937 to 1945 has any relation to that computation by which you arrive at the conclusion that the net worth in January 1946 would be the same, whether you take the higher income in those years or the lower income.

The Witness: Net worth would be the same, sir.

The Court: I know you say that, but I ask you, what is the relation of this figure of $202,865.81 to that calculation?

The Witness: The relation, sir, is this, that this figure of $202,865 represents the excess of the investments and expenditures over reported income for the period 10/18/37 to 12/31/45 based on the evidence presented here.

The Court: Oh, it doesn't represent then the excess of the income as claimed by the Government in those years in the civil case?

The Witness: No, sir.

The Court: Do you want to examine the witness further?

Mr. MacMahon: Just one question.

Your Honor, that figure, the excess investments and expenditures of Frank Costello in excess of his reported (1907) gross income actually is unreported income.

By Mr. MacMahon:

Q. Is that the fact, Mr. Leath? A. Yes, sir.

Q. And that money was used up, is that right? A. Yes.

The Court: Within that period?

Mr. MacMahon: In the period 1937 through 1945, your Honor.

The Court: And it is in excess of the income as shown on this exhibit for the years—

Mr. MacMahon: And it is unreported. The reason that was left off, if I may explain, your Honor, is because of the prejudicial effect it would have to label that unreported income, and at this time, in view of this, I ask leave of the Court to amend that label there so that that figure is unreported income for the years 1937 through 1945 as claimed by the Government, just as in the other schedules. But I think some of this confusion would be eliminated now if I may examine a little further.

Q. Now, Mr. Leath, if these expenditures in the civil case were added to the yearly expenditures shown on Gov-

ernment's Exhibit 162, it would increase your figure $312,007.73? A. That figure would be increased, yes.

Q. By the difference between those in the civil (1908) case and those proved here in this case, is that right? A. Yes.

Q. If you add it in there, as it should be, if it goes in at all, then when you take it out down here it has no effect, then, one washes the other, is that right? A. This figure 202,000 would be increased by the amount of the addition to the expenditures.

Q. And that additional expenditure would be money spent and not available for expenditures during the prosecution years, is that right? A. That is correct.

Q. And therefore would not affect his net worth— A. No, sir.

Q. —in any way? A. No, sir.

The Court: Now, Mr. Fennelly.

By Mr. Fennelly:

Q. Now, Mr. Leath, you have shown on Exhibit 362 gross income reported by Frank Costello at $269,516.37? A. 87 cents.

Q. 87 cents. Now, have you got the total that you compiled yesterday of the figures on the assessments on additional income for the years 1941 through 1945? A. The figure you read to me, Mr. Fennelly, total $292,564.25.

Q. And the Government assessed Mr. Costello on income, on additional income in that amount for the years (1909) 1941 through 1945, is that right? A. Yes, sir.

Q. Now, would you add that figure, then, please, to the gross income figure reported as set forth on your schedule 362—

Mr. MacMahon: Now, your Honor—

Mr. Fennelly: You had your time. Would you mind sitting down? There is no jury here.

Mr. MacMahon: I object at this point, because this is exactly where the confusion arises.

Mr. Fennelly: No confusion whatsoever.

The Court: Now, Mr. MacMahon, I am trying to find out what this is all about. Probably it is my stupidity. But there is no jury here, and I am not going to rule on the admission or exclusion of the requested evidence until I have a more intelligent view of it. Just be patient with me.

Mr. MacMahon: Your Honor, I think this is the point where the confusion arises.

The Court: Maybe it is.

Mr. MacMahon: And I would like to straighten it out.

The Court: Maybe this will help to make the confusion more evident. I am depending on you to show me that if it is the fact.

Q. Now, you have added the figures of the gross (1910) income reported by Mr. Costello, as shown by your Exhibit 362, which is the sum of $269,516.87; right? A. Yes, sir.

Q. And you have added to that the income which the Government said Mr. Costello had in the assessment for 1941 through 1945 which you have added to be the sum of $292,564.25; is that correct? A. Yes, sir.

Q. So the income of Mr. Costello shown by those assessments from 1941 through 1945, plus his gross income as shown on your schedule, totals the sum of $562,081.12 income for that period; right? A. Yes, sir.

Q. And on that basis your figure then at the bottom of schedule 362 of Investments and expenditures of Frank Costello in excess of reported gross income vanishes if you make that deduction, doesn't it? A. You have left out one fact, Mr. Fennelly, the fact that these—

Q. Just a minute.

The Court: Now, wait a minute. Let him give the answer.

Q. Will you first give me the figure and then—

The Court: No. Just a minute, Mr. Fennelly.

Mr. Fennelly: All right.

The Court: You have asked him a question whether (1911) or not a certain thing is so, and he says you have omitted something. Let him point out what is omitted.

A. Mr. Fennelly, you have omitted from this figure the yearly expenditures which on this schedule is $312,007.73, the excess expenditures represented by the difference between what you say was the total income per these reports and what we say was the total income per this schedule. Now, these moneys were expended and were not available for further expenditures after this time.

Q. Now, you say I have omitted it. I am taking your figures, and the figure of $312,007.73 which you have under a heading yearly expenditures— A. Yes, sir.

Q. —you have taken in arriving at the figure of $472,-382.68, haven't you? A. No, sir.

The Court: Let me ask a question.

You answer that question first yes or no, will you, please, and then I want to ask you a question.

The Witness: No, sir.

Mr. Fennelly: Now—

The Court: Well, he says "No."

Just a minute, Mr. Fennelly.

Mr. Fennelly: Now—

The Court: Is it a fact that the computations (1912) by which the alleged additional income which the Government charges the defendant had in the years 1941 through 1945 were based on additional expenditures in those years?

The Witness: Yes, sir.

The Court: And in order to take the alleged increased income into account you would have to also take into consideration the additional expenses?

The Witness: Yes, sir.

The Court: On which the claim of additional income was based?

The Witness: Yes, sir.

The Court: And those additional expenses for that period '45 are not now reflected on Exhibit 362?

The Witness: That is correct, sir.

The Court: And it is your point that if these additional expenses were added to the expenditures as shown on the exhibit, that the net result would be—

The Witness: Zero.

The Court: It would be zero, and the net worth, as you compute it for January 1, 1946, would be the same as it is now?

The Witness: Yes, sir.

The Court: Very well.

(1913) *By Mr. Fennelly*:

Q. Mr. Leath, if you cannot show for the years 1941 through 1945 any expenditures other than you have shown in this case which you have proven, and Mr. Costello had the income which you assert in the assessment that he did have for the years 1941 to '45, Mr. Costello would then be left with the balance between the amount of expenditures

you prove and the amount in the assessment you assert that he has, wouldn't he?

Mr. MacMahon: Your Honor, just—

The Court: No.

A. No, sir, because the difference between what is in this case and what is in this schedule is represented by expenditures, and in order to correctly reflect the figure as you have presented it, Mr. Fennelly, you would have to put those expenditures on this schedule.

Q. Mr. Leath, I want you—

The Court: And the expenditures in that period, if they turn out in the proof to be less than they are now set up in the civil case, would reduce the claimed income by that much, would they not, proportionately?

The Witness: Yes.

The Court: Very well.

Q. Now, Mr. Leath, you have proven, you said, according to your schedule, the expenditures of Mr. (1914) Costello through the years 1941 and 1945, haven't you? A. Yes, sir.

Q. And they are included, are they not, in this figure of $312,007.73, as shown on your schedule Exhibit 362? A. That is correct.

Q. Is that right? A. Yes, sir.

Q. Now, will you take the gross income reported by Mr. Costello, please, of $269,516— A. 87 cents.

Q. —87 cents, and add to it the additional income for the years 1941 through 1945 which the Government assessed, which is the sum of $292,564.25; right? A. Yes, sir.

Q. And that totals, between the income reported and the income which the Government asserts that he had the years

1941 through 1945, totals $562,081.42; is that right? A. That is right.

Q. Now, the expenditures that you have proven, including the years 1941 through 1945, as shown by your schedule, total how much? A. $312,007.73.

Q. Leaving a balance to Mr. Costello of the difference? A. No, sir.

Q. Just a minute. How much it is?

Mr MacMahon: Now, let him answer.

A. No, sir.

Q. Of course it is. A. No, sir.

(1915) The Court: I will allow the witness to answer.

Q. Will you please give us the figure which is the difference between the total spent—

Mr. MacMahon: Now, your Honor—

Mr. Fennelly: Just a minute.

Mr. MacMahon: Let him answer the question that was asked. Mr. Fennelly cuts him off and won't let him answer the question.

The Court: What was the question that was cut off? And please allow the witness to answer.

(Record read.)

Q. Now—

Mr. MacMahon: Just a minute. Answer the question fully. You cut off his answer.

Mr. Fennelly: Now, look. You can do anything you want with him when I am finished.

The Court: I know, but he had better do what I want now. He did attempt to add something to the answer "No," and I wish he would give it because this is for my benefit.

Mr. Fennelly: All right.

A. Mr. Fennelly, you still haven't included the expenditures as represented by the difference between the two figures, and when you do that you will come out with (1916) a zero answer.

Q. But, Mr. Leath, you are assuming that the expenditures were made? A. Well, that was the reason the report was set up, Mr. Fennelly.

Q. Now, prove that the expenses were made. That is all I am asking you in this question.

The Court: Mr. Fennelly, the witness has answered me before that if you prove there is sufficient then the tax claim would have to be correspondingly and proportionately reduced. And the difficulty here is this: When we got into this yesterday I was under the misapprehension that the taxpayer here had conceded that he had this additional income and that it was only a matter of adding it up. I then found out that it was merely a claim on the part of the Government which you or the defendant, rather, are very strongly resisting in the Tax Court. And you claim that the Government is completely wrong down there. What you are trying to do here is get the benefit of the Government's calculation there, which is an entirely different calculation than the one here.

Mr. Fennelly: Your Honor, the Government has made the assessment—

The Court: Yes, which you have resisted.

Mr. Fennelly: —and the assessment is prima (1917) facie proof of the fact that we had income in that year as a matter of law.

The Court: Yes.

Mr. Fennelly: I say, then, that the Government has stated we have that much income and, therefore, it is prima facie proof of it. Now, if you add what would be left over as against their proof in this case, you will find an excess of money which Mr. Costello would have as of December 31, 1945 in the subtraction of the two figures $562,081.12 and $312,007.73, which represents the expenditures proven in this case up until 1945, including the years 1941 to 1945, for which he was assessed.

By Mr. Fennelly:

Q. Would you please—

The Court: Yes, but, Mr. Fennelly, let us carve that up.

Mr. Fennelly: May I have on the record, please, your Honor, just for purposes of the record, what this figure is?

The Court: Yes.

Mr. Fennelly: Because it is important.

The Court: Oh, you may.

Q. Would you please subtract the figure shown on your schedule of the expenditures of the Costellos from (1918) '37 through December 31, 1945, which is the sum of $312,007.73 from the figure of $562,081.12, which represents the reported income of Mr. Costello plus the income as assessed by the Government for the years 1941 through 1945?

Now, would you give us that figure, please?

And how much is it? A. $250,093.39.

Mr. Fennelly: I have no further questions.

The Court: Very well.

Mr. MacMahon: I want to add one fact. This is in respect to Mr. Fennelly's legal argument. If these judgments of assessment are prima facie proof of unreported income, they are also prima facie proof of the facts on which they are based, and those facts include these additional expenditures. If they are admissible in the pre-prosecution period, if that door is opened, they are likewise admissible in the prosecution period, your Honor, and the result which comes from the difference is in the degree of proof and proof only.

Mr. Fennelly: Your Honor, let us examine this question, the difference of the degree of proof. There is no difference in the degree of proof in a civil case and a criminal case. The proof is exactly the same. The only difference is as to what a jury might determine, whether or not beyond a reasonable doubt.

(1919) The Court: What you say is that the rules of admission—

Mr. Fennelly: The proof, in other words, of the Government is exactly the same in a civil case and a criminal case, and I say let the Government prove it. Look: They have had us here a month proving these expenditures. They have had all the opportunity to prove it and there is not a bit of difference between the civil case and a criminal case as to what the proof is, as to admissibility in evidence.

Mr. MacMahon: Your Honor, in a Tax Court, an administrative body, I submit the rules of evidence are nothing—nothing. They don't even approach what they are in a criminal case, and your Honor, I think, can take judicial notice of that fact.

Mr. Fennelly: He could pay the tax and come into this court on the basis that he was over-assessed, and come in and recover his money back. You have exactly the same rules of evidence. The only test of difference is whether it is determined by a fair preponderance of the evidence in a civil case or by beyond a reasonable doubt in a criminal case.

Mr. MacMahon: There is quite a difference, your Honor, as your Honor knows.

Mr. Fennelly: Not as to the admissibility.

(1920) Mr. MacMahon: But the point is that these haven't yet been proven in the Tax Court, and when, as and if they were, it is almost a certainty that they would be greater. The only proof would show that these moneys were expended, that they were not available to spend during the prosecution period, and that wouldn't affect the net worth as of January 1946, as your Honor's questions to the witness plainly show. They wash out. The result is zero.

Mr. Fennelly: First of all, the Government could have tried this case civilly first, which I would have thought was the proper procedure of the Government, and the Government elected and arranged to do the opposite.

The Court: It seems to me that the situation, as it stands now before me, is that there is a contested point between the defendant and the Government in the case, the Government saying that in the years 1941 to 1945 the defendant had certain income over and above what he reported. By the petition which the defendant has filed in the Tax Court, he asserts he didn't.

So, at least to that extent, the Government is in a position here different from what it is in the Tax

Court, and so is the defendant in a position different here than what he is in the Tax Court.

(1921) In order to resolve those differences along the line that you are suggesting, by getting the additional assessments into the evidence here, it would require a trial here by me out of the hearing of the jury, or perhaps even by the jury, of the entirely collateral issue as to whether or not those assessments made for the period 1941 to 1945 were valid or not. And that I do not propose to do.

Mr. Fennelly: The Government—

The Court: This jury is going to have enough of a problem with all the five weeks of figures, and testimony, and these exhibits to ascertain whether or not the defendant is guilty of this charge here, and I am not going to further burden them with trying five tax cases for the years—six, I mean—no, I guess almost eight, 1938 to '41, to '45.

Mr. Fennelly: Your Honor, it is perfectly evident that if these expenditures were made as the Government has asserted they were made, then Mr. Costello's net worth on December 31, 1945 is increased by the sum of $250,000.

The Court: You say even if the expenditures were made?

Mr. Fennelly: No, I say, on the basis of the assessment.

(1922) The Court: Oh!

Mr. Fennelly: On the basis of the assessed figures.

The Court: Yes.

Mr. Fennelly: And that proof—

The Court: If you only put in the increased income on one side of Exhibit 362, you come out with the result, but if you put on the expenditure side the figures which the Government used to arrive at the

figures which you want on the other side, you would come out with a zero figure and the net result would be the same.

We have to get on. I have made my ruling on it.

The Court: We are doing what I was hoping we ness. We had half an hour yesterday afternoon and more than half an hour this morning. And if I am wrong, your record is protected, but I will now sustain the objection to the admission of the testimony and the admission of the report, I think you called for, on assessments in the years 1941 through 1945.

Mr. MacMahon: Your Honor, would you again please instruct the jury—Mr. Fennelly has dragged in these facts through his questions—that what counsel says is not evidence. The evidence is what comes from the witness stand.

(1923) The Court: You will have to let me rely on my judgment of what these jurors intelligence requires. I instructed them on that once, and I shall instruct them again if we come to general instruction before the case is submitted to them. I don't think it necessary to do it all the time.

Mr. Fennelly: There is one thing I would like to add to the record, that the net worth change as of December 31, 1945 does not come from expenditures alone. It comes from a starting net worth point. I mean, in other words, it is not predicated solely on expenditures.

Mr. MacMahon: I would like to have added to the record there that the net worth is predicated on expenditures. That the expenditure was made in a large asset makes no difference. Whether it was buying a pair of pajamas, or investment in Beverley Country Club, it is still an expenditure.

Mr. Fennelly: You must start with a net worth period and your figure must be based on that too, mustn't it? Cannot only on expenditure—

The Court: We are doing what I was hoping we would avoid, any further discussion about this ruling. I have made the ruling, and it is possible that I am wrong.

Mr. Fennelly: All right.

(1924) The Court: And if I am, I should suppose that, I know that, there is a place where it can be corrected, but we cannot do any more about it here. I have made the ruling.

All right, bring in the jury—

Oh, Mr. Marshal, no, hold the jury up for a minute.

I want counsel to come into my office, and I want the reporter to come in with them.

(The following discussion in the robing room:)

The Court: This hasn't anything to do with the matter that we have been discussing here. That is the reason I wanted to do it in here.

There is a character that is sitting out there in the front row—I don't know whether you have noticed him or not—on the right side.

Mr. Seymour: That is the fellow I asked you about yesterday (addressing counsel).

Mr. Delaney: With the newspapers or on the other side?

The Court: On the other side. No, not with the newspapers.

I don't know whether he is a normal person or not, but he is shifting around all the time. He looks as if he might be playing Spaceman or something (1925) like that.

Colloquy

Mr. Delaney: I think he is half drunk half the time. A couple of times he came over to me and wanted to borrow money or something. I don't know whether that is the same fellow.

The Court: Did you go for it?

Mr. Pierpoint: That is the fellow I spoke to you about yesterday (addressing counsel).

The Court: The reason I wanted to tell you about it, Juror No. 8, a man, spoke to my bailiff this morning and said that this fellow, he thought, was whacky, that is, the juror thought the man in the audience was whacky, and that yesterday, either as he was coming into the elevator downstairs, or out of the elevator, or into it upstairs, this fellow, not speaking directly to him, but mumbling to himself, says, "This thing is costing an awful lot of money."

That is the end of the report, but I want you both to know about it.

Mr. Delaney: Was he there this morning?

The Court: They weren't together alone. I think there were people going in. He was just mumbling to himself.

I wanted to tell you that.

I have an idea that maybe what I ought to do, (1926) since he appears to be a rather odd person, is to just tell him to stay out of the courtroom.

Mr. MacMahon: Certainly agreeable to the Government.

Mr. Delaney: Surely.

Mr. Fennelly: If that is the man I think it is, I have seen sitting there, I would be inclined—

Mr. Delaney: Been two or three who seem to be religious in their attendance.

The Court: Professional jurors are around every court. There are some of them who were probably here twenty years ago.

Mr. Fennelly: I think I know the man you mean and I would—

Mr. Delaney: If that is the one I think of, he was before 10 o'clock this morning because he was here when I got here, standing out there.

Mr. MacMahon: I have seen that one fellow sitting on the bench.

Mr. Delaney: I think he is harmless but I don't know.

Mr. Pierpoint: He always carries a batch of newspapers.

The Court: When the juror brought it to my attention, I thought I should bring it to the attention (1927) of counsel. I don't think it indicates anything.

Mr. Fennelly: No. I think it is the same one I had in mind. When insurance witnesses earlier in the case testified and one of them couldn't answer a question about loan value and so on on the policy, he came after me and said, "I knew insurance companies weren't any good. That is why I canceled my policy."

The Court: He may be—

Mr. Fennelly: I think it might bear out what you say.

The Court: He may be a little peculiar, that is all. That is a neutral enough word to be charitable.

I think that maybe at the luncheon time I will just tell the Marshal to tell him to stay out. That is the best way to do it. I won't make any announcement in court.

Mr. Delaney: That is right, no scene in court.

The Court: That is agreeable to counsel for the defense?

Mr. Fennelly: Yes.

Mr. MacMahon: Yes, your Honor.

(End of discussion in the robing room.)

(Short recess.)

(1928) (Jury present.)

WILFRED T. LEATH resumed.

The Court: Very well.

Cross Examination by Mr. Fennelly (Continued):

The Court: Before starting I think I probably ought to say this to the jury so they won't be thinking about it and trying to wonder what all the discussion was about.

We took a long time off yesterday afternoon and we took some more time this morning. We were discussing a question of law as to whether or not certain documents ought to be received, and the Court has ruled that they are not to be received, and we are going on from there.

There is no mystery for you to solve at all except the ultimate facts, if the case is submitted to you, and I think we saved time by spending some of it yesterday afternoon and this morning.

Mr. Fennelly: I am trying to see if I can find this schedule here.

Q. Mr. Leath, the—I can give you back Exhibit— A. I have it.

Q. Have you got a copy? That's all right. A. This is the earlier period?

(1929) Q. That is what I was worrying about. This is 362.

I show you schedule Exhibit 362. Under date of December 31, 1945 you have nothing for cash on hand for either Mr. or Mrs. Costello, do you? A. No, sir.

Q. And you have no knowledge of whether or not they had cash on hand and how much cash on hand they had, have you? A. I know, sir, that the investigation showed that they spent in excess of their income.

Mr. Fennelly: Just a minute. I move to strike out the answer. The witness has not responded to the question.

Mr. MacMahon: I submit the answer is responsive.

The Court: I will allow it.

Mr. MacMahon: May the witness continue with his answer?

Q. Do you know how much was in Mrs. Costello's safe deposit boxes December 31, 1945? A. Sir, I didn't count anything—

Q. Yes or no, sir, do you know?

Mr. MacMahon: The question cannot be answered yes or no.

The Court: Oh, yes, it can.

Q. Yes or no.

Mr. MacMahon: Does he mean a personal knowledge (1930) or what does he mean?

Q. (Continuing) Yes or no.

The Court: He has asked whether or not he knows how much was in those deposit boxes.

Mr. MacMahon: There are many ways one can know. He can either have a personal knowledge or he can know as the result of investigation and facts brought to his attention.

The Court: If you want to suggest a limitation, you may, ~~but the questioner did not suggest a limitation~~, and the witness would be free to answer.

Q. Tell me, yes or no, whether you know, was there anything in the safe deposit boxes of Mrs. Costello on December 31, 1945? A. No, sir.

Q. And you don't know what was in the safe in the Costello home on December 31, 1945 either, do you? A. I didn't inventory that safe on December 31, 1945.

Q. Now, will you answer the question yes or no? A. No, sir.

Q. Now, coming back to this Cadillac, had you included the value of that in your opening statement for October 18, 1937, it would have increased the net worth by the amount of the value, would it not? A. Net worth at that date would have been increased (1931) by whatever value the car was, yes.

Q. Now, the net worth has little or no relation to the money that someone has available to spend, has it? A. Yes, sir, it has a great relation to money they have available to spend.

Q. All right. Now, let us take an example. Suppose a man has no net worth and he borrows, let's say, a hundred thousand dollars; his net worth is still zero? A. He has a minus net worth of a hundred thousand.

Q. All right. He has minus net worth and yet he has $100,000 available to spend, hasn't he? A. Yes, sir.

Q. So that his net worth has no relationship to what he

has available to spend? A. That doesn't necessarily follow, Mr. Fennelly.

Q. It does in that case, doesn't it? A. In that specific example only.

Q. So that a man has a hundred thousand dollars to spend although he has no net worth whatsoever? A. He has a minus net worth, Mr. Fennelly.

Q. That is right, he has a minus net worth. He still has a hundred thousand to spend? A. That is right.

Q. Now, in schedule Exhibit 362, I notice that you jump from October 18, 1937 to December 31, 1945 (1932) without any intervening figures. A. Yes, sir.

Q. Now, have you the figures for the intervening years? A. Not in this schedule, no, sir.

Q. Have you got them? A. No, sir, I don't have those figures.

Q. In order to prepare the figure on December 31, 1945 you had to prepare schedules for the intervening years, didn't you? A. You don't have to prepare the intervening schedules, Mr. Fennelly, specifically.

Q. Now, would you let me see the totals for the intervening years? A. Which totals are you speaking of now, Mr. Fennelly?

Q. On how we arrive at a jump from December 18, 1937 to December 31, 1945, without any intervening figures? A. It is not necessary to have intervening figures because this period is considered the same as if it was one year, and as long as you have the opening figures and the closing figures the intervening periods, the intervening transactions within that period have no effect on either the opening or the closing.

Q. Well, on November 5th, if my memory serves me, Mr. Wolf testified that he returned to—1945—that he returned to Mr. Costello $9,500 as the result of money that Mr. Costello had given Mr. Wolf to purchase a tax lien on the

building adjacent to 79 Wall Street; (1933) is that right? A. Yes, sir.

Q. And haven't you figures showing whether or not you considered that in arriving at the cash on hand on December 31, 1945? A. Mr. Fennelly, during this whole period there is an excess of expenditures over available income, and that money is part of the excess.

Q. Now, would you let me look at your figures so that I can determine whether or not you took all of the items into consideration in arriving at these figures on December 31, 1945?

Mr. MacMahon: Mr. Fennelly has the figures, your Honor, right in his hand.

Mr. Fennelly: Well, he admits they are not attached to the schedule, and obviously they are not. And now I would like the figures he has so I can determine whether or not he has made error in arriving at those figures, your Honor.

Mr. MacMahon: Your Honor, he said he had no intervening figures. I object to the question, your Honor, on that ground.

The Court: Do you have them?

The Witness: No, sir, we didn't make—

The Court: Very well. That is the answer, he doesn't have them.

Q. You haven't any work papers in arriving at (1934) these figures showing the years between October 10, 1937 and December 31, 1945? A. I may have some work papers, sir, but they would not specifically show these in and out transactions, such as the one you are speaking of now.

Q. Would you let me see them, sir? A. I don't have them here in the courtroom.

Q. You haven't got them in court? A. No, sir.

Q. Well, they are in the building? A. I believe they are, sir.

Q. And would you get them for me, please, at the recess, so I can examine you further on the subject?

Mr. MacMahon: Your Honor, I object to that. They are of no relevance to this. The schedule he has testified to is that these intervening transactions have no consequence in the net worth. He is not being prosecuted here for anything that happened prior to 1945.

Mr. Fennelly: Well, your Honor—

The Court: Just a minute. He has made certain statements, and he is on cross examination, and the cross examiner wants to test the validity of the statements. Now, it may turn out that it will be all right, everything is going to balance out; but counsel is entitled to explore to see if he can show that that is not the case.

(1935) So you bring them for the afternoon session, whatever you have.

The Witness: Yes, sir.

The Court: All right.

By Mr. Fennelly:

Q. Now, Mr. Leath, will you tell me what Mr. Costello's expenditures were, I mean Mr. Costello himself, not Mrs., between November 5, 1945 and December 31, 1945? A. You said Mr. Costello's?

Q. Mr. alone. A. I don't have that information, sir.

Q. Well, you can determine it from the exhibits in evidence, can you not? A. It would be very difficult to determine that, sir, the specific expenditures of either Mr. or Mrs. Costello.

Wilfred T. Leath—for Government—Cross

Q. Well, the exhibits are all in evidence; you got the bank statements of Mr. Costello, the bank statements of Mrs. Costello, and you have the testimony of the witnesses and their exhibits. A. All the testimony, sir, does not indicate who paid certain of the bills.

Q. Would you please let me have, examining the exhibits and the testimony, and tell me, the expenditures of Mr. Costello, please, from November 5, 1945 through December 31, 1945?

(1936) Mr. MacMahon: Your Honor, he said he couldn't do that. He just answered that question.

The Court: He just said he can't do it.

Mr. Fennelly: Well, I can do it for him, but it will take me a lot of time, your Honor.

Mr. MacMahon: Does Mr. Fennelly mean who went to the store, or whose money was spent? I am not sure the question is clear.

Mr. Fennelly: No, I am taking your evidence and your exhibits. And I will show you that you can do it; it will take me a lot of time to do it.

The Court: Well, all right, but the witness says he can't.

Mr. Fennelly: Well, I am going to need some time. I don't want to sit down and take the time of the jury. It is just a matter of going through the exhibits and the testimony to do it.

Q. Now, Mr. Leath, schedule E of Exhibit 362 omits any income for Mr. Costello or Mrs. Costello for the year 1937, does it not? A. All the income they received in that year was prior to October 18, 1937; that is why it is omitted.

Q. Now, from what exhibit in evidence do you find that, because you told me just yesterday that you didn't know, and how is it that you know this morning? Show me (1937)

the exhibit that will tell us, give us, the answer to what you have just told us? A. I believe I told you yesterday, Mr. Fennelly, that with reference to 1937 the testimony was to the effect that all the money from the Bayou Novelty Company had been paid out prior to October 18, 1937.

Now, I believe Mr. Costello testified in his '37 statement that he had received moneys from Mr. Kastel weekly and sometimes monthly and that the last payment to him prior to October 18, 1937 was about three months prior to that time.

Q. Now, you don't know when Mr. Kastel paid Mr. Costello the $66,000 from the Kastel partnership during the year 1937, do you?

Mr. MacMahon: Now, your Honor, I object to the question.

Q. And didn't you so testify—

Mr. MacMahon: —unless Mr. Fennelly specifies what he means by the word "know." Does the investigation show it or does he refer to the witness' personal knowledge?

Q. And didn't you so testify yesterday that you didn't know when Mr. Kastel paid Mr. Costello the $66,000 from the Kastel partnership for the year 1937? A. To my personal knowledge, sir, I don't know (1938) the exact dates that the money was paid.

Q. And you so testified yesterday? A. Yes, sir.

Q. And you have included—you have not included in schedule E any income for the Costellos for the year 1937? A. Our investigation showed they didn't receive any after that date.

Q. Just answer the question, please, yes or no— A. No.

Q. —have you included any? A. No, sir.

Q. Now, Mr. Kastel sat out in the witness room there for two weeks—

Mr. MacMahon: Your Honor, I object to that question, as immaterial.

The Court: Sustained.

Q. And there was no testimony by Mr. Kastel in this case upon which you base your testimony?

Mr. MacMahon: Your Honor, I object to that question. Obviously there wasn't.

The Court: Sustained.

Q. Now, will you tell me where in your schedule you reflect any drawings from the Pelican Novelty Company, and I am referring to your Exhibit 362? A. Sir, the Pelican Novelty Company was a part—

Q. Will you just answer my question, please?

Mr. Fennelly: Would you read the question (1939) to the witness?

(Record read.)

A. The drawings, sir, are not specifically reflected, since it is an in and out transaction within this period.

Q. Will you tell me what the drawings were? You have just said it was an in and out transaction. Will you tell me what the drawings were, and refer me, please, to the testimony of any witness and the exhibit number? A. I believe, sir, there wasn't any testimony relative to the drawings by anyone from the Pelican Novelty Company.

Q. Now, then, on Exhibit B, under the heading of invest-

ments, you have an item Louisiana Mint Company, and that is under December 31, 1945? A. Yes, sir.

Q. $17,636.40, is that right? A. Yes, sir.

Q. And you have as your source behind that Exhibits 150 and 153.

Mr. Fennelly: Could I have those, please?

May I have Exhibit 151, please?

Mr. MacMahon: Mr. Fennelly, here is 152, which I think—

Mr. Fennelly: 151.

Mr. MacMahon: You will need 152, to make a clear picture.

(1940) Mr. Fennelly: I always appreciate your aid. But let me have 151, will you?

Mr. MacMahon: You have it in your hand.

Q. Now, you have a figure of $17,636.40; right? A. Yes, sir.

Q. Now, on Exhibit 153 there is a statement on there that the balance at December 31, 1945, after giving effect to profit on a cash basis, shown by the monthly statement before provision for depreciation and after drawings for December 1945, was $22,832.87; is that right? A. Yes, sir.

Q. Now, you have deducted from that amount some—what is it? Five thousand? A. $5,196.47.

Q. To arrive at your figure? A. Yes, sir.

Q. Now, that five thousand odd dollars was not paid to Mr. Costello until January 1946, was it?

Mr. MacMahon: Your Honor, I submit the documents speak for themselves.

The Court: Overruled.

A. The figure you are referring to, Mr. Fennelly, is five thousand—

Q. Will you just answer the question first? A. This specific—

Q. I think we both understand the problem. We are just trying to get at the facts.

(1941) Mr. Fennelly: Would you read the question, please?

(Question read.)

A. I don't know whether this specific five thousand was paid to Mr. Costello in 1946.

Q. Well, if it had not been paid, then your figure of 17,000 that you have in your schedule, $17,636.40 should be increased by five thousand, shouldn't it? A. No, sir.

Q. The value, as shown on the Exhibit 15[illegible] would you read it, please, the balance at credit? A. (Reading) Balance at credit December 31, 1945, after giving effect to profit parentheses cash basis December '45 as shown by monthly statement parentheses before provision for depreciation end of parentheses and after drawings for December 1945.

Q. Is how much? A. $22,832.87.

Q. And that is $5,000 more than the figure that you have in your schedule B of 362 for Louisiana Mint at December 31, 1945; is that right? A. Yes, sir.

Q. Now, I show you Defendant's Exhibit X, which was the report of Charles B. Murphy, the accountant from New Orleans, December 1945; right? A. Yes, sir.

Q. And for Louisiana Mint Company. And what is (1942) the cash balance of Louisiana Mint, as shown on that exhibit, as of December 31, 1945, that is, Exhibit No. X? A. Exhibit X shows—the page number—

Q. The last page. A. On the last page, that the cash balance available December 31, 1945 was $63,988.22.

Q. And isn't it a fact that the exact same cash balance is carried forward to the January 31st statement 1946? A. No, sir.

Q. And how much is the difference? Slight increase? A. About $2,500.

Q. And does Exhibit X reflect any distribution to partners during the month of December 1945? A. No, sir.

Q. Now, on your schedule 362-C, which is the schedule of expenditures, you have taken the figure—you have a figure appearing for the years 1938 through 1945 of $2,000 spent to a Sylvia Leichner? A. Yes, sir.

Q. And that was the florist lady with the dark glasses that came on the witness stan A. Yes, sir.

Q. And the expenditures for that period for flowers in her shop you have down as $16,000? A. Yes, sir.

Q. And you have taken Mrs. Leichner's word as (1943) the gospel, and if what she was saying was not so that schedule should be reduced by whatever the proper amount will be; is that right? A. She has stated that was her best recollection, I believe.

Q. Yes. And I say if that would not be so, if the jury would not believe it so, your schedule would have to be corrected by that amount, wouldn't it? A. Either up or down, yes, sir.

Q. Well, it could hardly be up because she didn't testify to any more, did she? A. No one has testified to any less either yet, sir.

Q. So it would only be down? A. I don't know.

Q. Did she testify to any more? A. No, sir.

Q. Now, then, let us take a look at Exhibit 363. A. I don't have a copy of that, Mr. Fenneily.

Q. (Hands to witness). A. Thank you. This is the wrong one (handing to Mr. MacMahon).

Q. Have you got one? A. No, they are getting one for me.

Mr. Fennelly: Will you get the original exhibit so he can work with it?

Have you got the original exhibit?

Q. It is easier reading that one I think (handing). Now, the first thing, Mr. Leath, on the Exhibit (1944) 363, under the heading of investments on the first page, January 1, 1946, you have an amount and you refer to a schedule B. A. Yes, sir.

Q. And on your schedule B under date of January 1st, 1946 is the Louisiana Mint item of $17,636.40. A. Yes, sir.

Q. Now, that is the same matter that I have just been over with you, and if the amount had not been paid out the value of that would be five thousand more than the figure shown by your schedule, is that right?

Mr. MacMahon: Your Honor, I object to the form of that question.

The Court: Overruled.

A. The books indicate that the amount was paid out, sir.

Q. Just go back on Mr. Murphy's work sheet and this book. A. I would like to see the other exhibits too, sir.

Q. Mr. Murphy's reports to Mr. Costello indicate that it was not paid out, doesn't it, Mr. Leath? A. May I have a moment to look at this other exhibit, please?

Q. Yes. A. Mr. Murphy's report, Mr. Murphy's— Just a moment, sir. Mr. Murphy's report does not show that this money was paid in December 1945. Mr. Murphy's (1945) schedule and the books of the Louisiana Mint Company show that it was paid in December 1945.

Wilfred T. Leath—for Government—Cross

Q. Now, whose schedule is 153, Government's Exhibit 153? A. This is Mr. Murphy's.

Q. All right. Now, the balance on the schedule as shown is not 17,000, which you have, but $22,832.87; isn't that right? A. The balance is what I have on the schedule, sir.

Q. Isn't the balance as shown by the schedule that I am referring to— A. I am sorry, I misunderstood you.

Q. Which is Mr. Murphy's, you testified, Exhibit 153, doesn't it show that the balance as at December 31, 1945 is $22,832.87? A. That isn't what you asked me before.

Q. Doesn't it show you that? A. Yes, sir.

Q. Don't you remember that Mr. Murphy testified that he was not sure when that had been paid? A. Mr. Murphy testified as to what the books said, sir.

Q. And that he couldn't tell when it was paid; didn't he say that? A. I am not sure that he made that statement.

Q. I am speaking about Mr. Murphy, the accountant— A. Yes, sir.

(1946) Q. —from New Orleans. A. I believe he said the books showed it was distributed in December 1945.

Q. And his own cash report to Mr. Costello shows that it was not paid? A. His report, as I said before, sir, shows that it was not paid; his schedule and the books show that it was paid.

Q. And his report to Mr. Costello shows that it wasn't paid? A. That is right sir.

Q. Where is that item in the books that you say that it shows it was paid? A. Right here, sir.

Q. And we are now referring to an item— A. Exhibit 152.

Q. Exhibit 152. A. Marked journal 9, under date of January 31, 1946. The debit entry on the journal entry is entitled distribution to partners, 45,000. Credit entry is cash $45,000. Underneath is this explanation, distributed

in December 1945, $25,000. And inasmuch as Mr. Costello was a 22½ per cent partner his share would have been 5,000,—whatever the amount—$5,625.

Q. And does that not reflect an amount to be distributed from earnings, rather than the fact that there was a distribution? A. The word, Mr. Fennelly, is "distributed"; that means past tense, and I understand that to mean distributed in December 1945.

(1947) Q. And Mr. Murphy, the accountant, who prepared the books and prepared his report to Mr. Costello, his report to Mr. Costello indicates that it hadn't been paid, isn't that right? A. I answered—

Q. To Mr. Costello? A. I have answered that several times, sir.

Q. It indicates that it wasn't paid to Mr. Costello? A. Yes, sir.

Q. And this is a report Mr. Murphy is sending to Mr. Costello, is that right? A. I assume he sent it to him; I don't know.

Q. Didn't he so testify? A. I believe so, yes, sir.

Q. Now, then, would you refer to an item on page 363—

The Court: You mean exhibit.

Q. On Exhibit 363, sir. Excuse me. On the first page, under the year 1948 you have some adjustments. A. Yes, sir.

Q. Now, will you tell us about that adjustment? You have them in several years, haven't you? A. Two years.

Q. '47 and '48? A. Yes, sir.

Q. Now, take this one in 1948 and tell us about that again, would you? A. In order, sir, to properly (1948) understand my explanation it would be necessary for you also to refer to schedule B.

Q. B or C? A. B. In order to explain the adjustments under C it is necessary also to refer to schedule B.

Q. All right. A. Do you have that schedule, Mr. Fennelly?

Q. Yes. A. The first adjustment in the year 1948 is $22,000 representing the loss on the capital stock of the Crescent Music Company, Incorporated.

The Court: Which year is this? '48?

The Witness: Yes, sir.

(1949) Mr. MacMahon: Your Honor, he is cutting off the answers. Let him answer the question.

Mr. Fennelly: But you don't mind if I try to find out what he is telling me, do you?

Mr. MacMahon: If you would listen—

The Court: Does anybody mind if I find out what is going on? I was not aware that he had been cut off.

Were you cut off in your answer?

The Witness: Yes, sir.

The Court: Very well.

Now, will you repeat your answer and make it as complete as you think it necessary in order to explain the figure that you have been asked about?

A. The first—

Mr. Fennelly: I am trying to find out the page that he is referring to when he gives the figure. That is all I am trying to find out.

A. Oh, all right. I am sorry. Under Schedule C—do you have that, Mr. Fennelly?

Q. Maybe if I come up and follow you from here it will be easier. A. Under Schedule C, the first item is $22,000,

representing the loss on the capital stock of Crescent Music Company, Inc.

Q. And that was Mrs. Costello? A. Yes, sir.

(1950) Q. All right. A. Now, referring back to Schedule B—

Q. Excuse me, that was a capital loss; right? A. Yes, sir.

Q. All right. A. Referring back to Schedule B, you will notice that under the date of December 31, 1947—

Q. Just a minute until I find it now. A. Right here, sir (indicating).

Q. Yes? A. Under date of December 31, 1947, the schedule shows an investment in the Crescent Music Company, Inc. as $22,000.

Now, I would like to see the 1948 return before I continue with the explanation.

Mr. Fennelly: May the witness have the 1948 return?

Q. (Hands to witness). A. Thank you. Now, under date of, on Schedule B, under date of December 31, 1948—right here (indicating).

Q. Yes? A. —there is no investment shown for the Crescent Music Company, Inc., inasmuch as the corporation was liquidated or either Mrs. Costello withdrew her interest in it during the year 1948.

Now, the return filed by Frank and Loretta Costello for the year 1948 shows a capital loss of $1,000. That loss is in reference to the $22,000 that Mrs. Costello lost in the corporation in 1948, (1951) but due to the limitation in the loss she was only allowed to take 1,000 of that loss during the year.

Q. Although she lost how much? A. 22,000. Now, the loss of that 22,000 didn't mean that Mrs. Costello got any money; it was a loss, it was money that was gone.

Now, that loss is reflected in the net worth statement through the dropping off of this asset of 22,000 at the end of 1948.

Now, in order to properly reflect this item of $22,000 with reference to the moneys available to spend, it was necessary to make an adjustment of $22,000 as indicated by Schedule C.

Q. When you say you made an adjustment of 22,000, what did you do with it? A. The money was lost, sir.

Q. No, no. Just answer the question. You told us, now—I mean, I follow you along on each of your items, but now you are telling me you made an adjustment— A. Yes, sir.

Q. —of 22,000. Explain to the jury how you make an adjustment of 22,000, won't you? A. The 22,000, as I indicated, sir—

Q. I think we are all up with you right to the point of the adjustment, and that is what we are trying (1952) to get at now. Will you tell us how you do that?

Mr. MacMahon: Your Honor, could the witness—

Q. What do you do to make the adjustment?

Mr. MacMahon: —be allowed to answer the question?

The Court: The witness wasn't cut off. The inquirer has a right to ask the question.

Mr. MacMahon: I don't object to the question if the answers come out.

The Court: Overruled. Let us get along.

Why don't you lead him to the point you want, Mr. Fennelly, and let us get through with it? You want to show that he added it instead of subtracting it. If that is what you want to get at, ask him.

Mr. Fennelly: That is what I want to get at.

Q. There has been a loss of $22,000— A. Yes, sir.

Q. —and you say that you made an adjustment? A. Yes, sir.

Q. How do you make the adjustment? You added it, did you, back to the net worth? A. Yes, sir.

Q. So Mrs. Costello had had a loss of $22,000 from her net worth, and on your accounting figures you take the loss and you add it back to its full value, do you? A. Because it didn't make any money available to (1953) them to spend.

Q. Let's see if we can reduce it to the kind of language I understand. A. All right, sir.

Q. On the subject of net worth. A. Yes, sir.

Q. I have a house that is worth 25,000, and no other assets; it is not insured; my net worth is 25,000; right? A. If that is your only asset, yes, sir.

Q. I have a fire, and when—

The Court: And no insurance, I take it.

Q. No insurance. And when I am left with this wreck all they say it is worth is $5,000, which is the land. What is my net worth? A. $5,000.

Q. But on your accounting you take my loss of 20,000 and add it back, don't you, and make me back whole again; isn't that what you have done in this case? A. No, sir, I don't add it back to make you whole; I add it back—

Q. But you did add it back; you just told me you added it back. A. I said I added it back, Mr. Fennelly, in order to show how much money was available since this loss didn't make any money available.

Q. So you are shifting from the net worth method to expenditures to get on a cash basis, are you? A. All this is on a cash basis, sir.

Q. Oh. Wouldn't it be so simple to just take all (1954) the receipts and all the disbursements and see where we are? A. That is, in effect, what we have done here, sir.

Q. But you don't need any adjustment when you do it that way, do you, Mr. Leath? Now, would you please prepare for me from the exhibits and testimony in evidence a statement of all the receipts and all the disbursements for the years 1946 through 1949, and breaking them down between Mr. and Mrs. Costello?

Mr. MacMahon: Your Honor, I object to that.

The Court: Sustained.

(1955) Mr. MacMahon: If Mr. Fennelly wants to prepare it, he is free to do so.

Mr. Fennelly: No. I would like to interrogate the witness about it.

The Court: You may interrogate him.

Q. Now, Mr. Leath, would you tell me the receipts, first for Mr. Costello for the year 1946. A. I am referring now to Schedule F, Mr. Fennelly.

Q. Schedule what?

The Court: F, he said.

Mr. MacMahon: Would you repeat the question, Mr. Reporter?

(Question read)

A. I am sorry. I misunderstood your question, Mr. Fennelly. I thought you were talking about income.

Q. Well, we will start with income, and on the income you have four—~~will~~ you tell me what are the items of Mr. Costello—not Mrs.—for the year 1946? A. Salary, $7,484.85—79 Wall Street.

Louisiana Mint Company, $19,335.25.

Miscellaneous, $8,229.25; which has been identified as Beverley Country Club.

Q. That is Beverley, is it not? A. Yes. That is all in that year.

Q. Were there any other receipts during 1946, (1956) according to the exhibits? A. Yes, sir, there are. Exhibit 363 shows there must have been receipts because there were expenditures in excess of the income reported.

Mr. Fennelly: I move to strike out the answer.

The Court: Sustained.

Mr. Fennelly: I would ask your Honor to admonish the witness.

The Court: Yes. I think you had better answer a little more directly. That can be brought out. The difficulty with this business is that we get all confused on it. You are asked about receipts. You had better answer that.

Mr. MacMahon: The question is not clear what he means by receipts. The whole theory of the Government's case is that these expenditures are receipts.

The Court: I don't agree with you on that.

Mr. Fennelly: You can argue in due course about that.

The Court: That is obviously not necessarily so, Mr. MacMahon.

Mr. MacMahon: But, your Honor, I submit that is what the question for the jury is in this case.

The Court: That may very well, but the whole purpose of cross examination is frustrated if the cross (1957) examiner is not allowed to probe to ascertain what the fact is. That is the whole point,

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I think, whether money spent was income. If it wasn't income, then there wasn't any harm done.

Mr. MacMahon: Precisely, but the question is pegged to what was reported income, not unreported income.

The Court: This question was, what were the receipts, not what was income, and the dispute arose between the cross examiner and the witness, and the cross examiner is clearly entitled to wide latitude in determining what the answer is.

You may take the witness then on redirect examination and develop what you think is appropriate, but this business only gets us confused and we waste time.

Go ahead.

The Witness: Would you read the question?

(Question read)

The Court: "Receipts" is what you have been asked, whether there were receipts or not.

The Witness: I would say, sir, based on this exhibit there were receipts.

The Court: All right. That is all right. There were what you consider to be receipts. That's fine.

(1958) Q. Now, wasn't there proof of a loan from Mr. Erickson in the sum of $25,000? A. In what year, sir? Q. 1946.

Mr. MacMahon: That calls for a conclusion, whether there was proof of a loan or not.

The Court: Do you mean testimony?

Mr. Fennelly: The Government proved it, your Honor.

The Court: You mean testimony, I take it?

Mr. Fennelly: Yes, testimony or exhibits.

The Court: That is the basis of the objection, that you used the word "proof," and Mr. MacMahon suggests that all there is is testimony.

Mr. Fennelly: There were exhibits, I am sure.

Mr. MacMahon: Exhibits. There was no testimony.

The Court: All right. Evidence.

Mr. Fennelly: I don't understand the—

The Court: Evidence. Let us not get into a semantics problem here. There is evidence of some kind.

All right, go ahead with your question.

The Witness: I asked Mr. Fennelly, sir, what year he was referring to.

The Court: Yes.

Mr. Fennelly: 1946, I said.

Q. Mr. Leath, that is the year we are on. (1959) A. Yes, sir.

Q. And that was $25,000? A. Yes, sir.

Q. Were there any others? A. Any other what, sir?

Q. Receipts. A. The schedule indicates there were receipts because there were expenditures, sir.

Mr. Fennelly: That is the second time. I move to strike out the answer.

The Court: I am going to direct you to answer these questions; any time a question is unclear to you, you may state that.

The Witness: Yes.

The Court: You said you are an accountant of some experience. When you are asked whether there was a receipt, I expect you to answer that responsively.

The Witness: Yes.

The Court: Unless you tell me the question is unclear.

The Witness: May I have the question again?

(Question read).

Q. And give us the name of the person—

The Court: First, were there any other receipts?

The Witness: I know of no other specific receipts, sir.

The Court: All right.

Q. And what was the cash in Mr. Costello's bank (1960) account on January 1, 1946?

The Court: What schedule would that show on?

The Witness: Schedule A, sir.

The Court: A?

The Witness: Yes.

A. Schedule A shows the balance in Mr. Costello's account at the Corn Exchange Bank and Trust Company on January 1, 1946, to be $19,917.05.

Mr. Fennelly: Your Honor, to go on, the witness said that he couldn't show what the expenditures were of Mrs. Costello and Mr. Costello, and I will have to segregate them and interrogate the witness about them unless he can do that, and it is going to take me some time to do it.

The Court: What do you suggest?

Mr. Fennelly: I dislike having the jury and yourself sit here while I pick through these items to organize it.

The Court: Probably wouldn't be very exciting.

Mr. Fennelly: I would have to sit down and assemble them from all the exhibits to proceed with the examination.

The Court: I don't hear you.

Mr. Fennelly: I would have to sit down and go through all the exhibits and allocate them, the (1961) testimony—

The Court: How long do you think that would take?

Mr. Fennelly: I would doubt if I could do it in eight hours.

Mr. MacMahon: Your Honor, may I be heard?

The Court: Yes.

Mr. MacMahon: Mr. Fennelly has had an accountant, Mr. Sweeney, sitting at his side for five weeks during this trial. He has asked every single expenditure witness this question.

I submit, your Honor, this is nothing but an attempt to delay this trial with these schedules. If Mr. Fennelly needs them, he certainly knew that when he began it or he wouldn't have asked such questions.

And, to delay this trial now for eight hours, I suggest, or I submit, would be a prejudice to the Government and to the administration of justice in this case.

The Court: I didn't hear that last one.

Mr. MacMahon: —and to the orderly procession of this trial.

Mr. Fennelly: I haven't the slightest desire—I would have assumed that the witness would have had these schedules all broken down, seeing that they have been working on the case far longer than I have, and (1962) I might tell your Honor that

when I say the amount of time, I don't know, but I can tell your Honor now that Mr. Sweeney hasn't had a chance to even check the accuracy of the exhibits yet, of 362 and 363, that we haven't even gotten that far, and what I have been trying to do is no less than prepare what I am asking this witness about, and we have worked until the wee hours of the morning.

Mr. MacMahon: Your Honor, may I further add that it is irrelevant? The question here is not in whose name is the account, or who went to the store. The question is whose money was spent.

The Court: I still don't know what your proposal is, Mr. Fennelly. Are you suggesting to me that you have completed all your cross examination of this witness—

Mr. Fennelly: No.

The Court: —except as to the matters which you have developed as the result of these schedules?

Mr. Fennelly: I am suggesting that I cannot cross examine the witness until I may examine them. He said he couldn't do it from the testimony and exhibits, and I have told the Court that I believe I can, and, therefore—

(1963) The Court: Just a minute. I will excuse the jury now.

Ladies and gentlemen, you are excused until 2.15, and remember my instructions to you: Don't talk about the case among yourselves, and don't be influenced by anything that you might read in the papers about this case. I suggest, if you do see a headline about the case in one of the papers, not to read it. Keep your minds completely open until all the evidence is in.

(Jury retires)

Colloquy

The Court: Mr. Fennelly, would you tell me what it is that you propose to prove by this?

Mr. Fennelly: I propose, your Honor, in view of the witness's testimony—you see, the witness has, working on this net worth basis, has taken, for example, a loss, as we have just demonstrated, for 1948, to Mrs. Costello. And, as he said, because no money came to her by virtue of the loss, he then adds it back to increase the net worth, indicating that he is straddling. They are working partly on a net worth basis and partly on cash.

I want to show on a cash basis where we stand as a result of these figures.

The Court: And propose to prove what, as a result, by having the witness break down the expenditures (1964) into—

Mr. Fennelly: Break them down.

The Court: —to Mrs. Costello and Mr. Costello?

Mr. Fennelly: Yes.

The Court: What do you propose to show by that?

Mr. Fennelly: The money that they had on hand, what they received—

The Court: Why is it necessary to break it down to do that?

Mr. Fennelly: Because I think that is the only way you can arrive at the true figures on a cash basis of what they took in, and what they had spent, and what they had at the beginning.

The Court: That may be, but wouldn't that be able to be shown by the income and outgo of cash, whether it was a cash of Mrs. Costello, as you would claim, or cash of Mr. Costello?

Mr. Fennelly: No. For instance, on this very loss, what they had done on these schedules—

Colloquy

The Court: That is true, but does the ownership of the asset make the difference?

Mr. Fennelly: It does to me, your Honor, yes. I mean—

The Court: Maybe it would to me if you would explain to me what relevance it has in this case in view (1965) of the charge here.

Mr. Fennelly: Despite the charge—I mean, I have a right to develop, I think, through the witness's cross examination the fact as to where the money came from, what account, who paid them, and it will show you two pictures.

It will show you what was Mr.'s expenditures and receipts, what Mrs.' expenditures and receipts were, and then what was available in the beginning from the testimony in the case.

The Court: I am not saying that the admission of testimony along that line would not be relevant in this case. I am not suggesting that. You have got this witness on the stand now. You are cross examining him—

Mr. Fennelly: That is right.

The Court: for the purpose of testing, undoubtedly, at least one of your purposes is to test, the accuracy—

Mr. Fennelly: That is right.

The Court: —of the schedules that he has introduced.

Mr. Fennelly: That is right.

The Court: You show me how the breakdown of cash receipts between Mrs. Costello and Mr. Costello (1966) would affect the integrity or the validity or the correctness of that exhibit.

Mr. Fennelly: Your Honor, right on this very item for 1948, that I have been examining him about,

where they have made an adjustment, although she had lost some $22,000, they make an accounting adjustment and put it back into the account, and then they proceed to deduct from the gross income her gross income.

The fact was, although she had no income, according to the return in that year, because she had a loss, she did receive money.

The testimony—and there is an exhibit in evidence—some $12,000 or more that she received, and they don't give any credit in these accounts at all for the expenditures out of her bank account from money that she had.

The Court: You may examine him on that.

I don't think you have developed that now. I certainly will not extend the time, or I certainly will not direct the witness to prepare the schedule which you have requested, and I will not now grant you a delay of the trial for this purpose unless you show me some better basis for it than you have up to now.

Mr. Fennelly: I cannot proceed to examine him (1967) because—

The Court: You have just indicated—

Mr. Fennelly: —what I want—

The Court: You have just indicated there was one receipt of $12,000 which had not been taken into consideration. You have indicated that you know that they haven't given her any credit for certain matters in the bank account and another item of $12,000.

Why don't you go into that and let us see what we come out with?

Mr. Fennelly: Because it is a result of the entire setting-up of the schedules—result of the entire

setting-up of the schedules—and to do it, I have to go down the line and take the facts of receipts and disbursements, which is the simple approach to this, where you need no adjustments.

The Court: In other words, you are—

Mr. Fennelly: What came in and what went out.

The Court: You want to argue with the witness he should have done it a different way.

Mr. Fennelly: No, I want to develop the fact that it is in evidence here that certain money was received, certain money was disbursed.

The Court: All right. That is true; you may cross examine the witness with respect to that and (1968) ascertain whether or not it was properly treated in this account, and you can attack it along that line.

Mr. Fennelly: To do that, then, I have to take the expenditures and I have to break them down. I mean, I have to show, your Honor, that, both Mr. and Mrs. The composite picture can be put together afterwards, but they are separate bank accounts, and we have to take their receipts.

For instance, there is something in this very year—

The Court: We started this trial on the 5th of April and we have had these witnesses go on day after day, identifying particular items, checks, bills and stores, and I just find it unwise, I think, and unjustified, to extend any time.

You may go ahead and do the best you can the rest of the afternoon.

Mr. MacMahon: Your Honor, may I be heard just very briefly?

The Court: You got a ruling. I don't know why you need to argue it, Mr. MacMahon.

Mr. MacMahon: I don't want to argue it. I merely want to point out to your Honor that these schedules subtract out every dollar out of Mrs. Costello's reported income and thereby accomplishes, (1969) with one fell swoop, what Mr. Fennelly now proposes to do item by item, item by item, item by item.

The Court: That may be, but it is cross examination and he has a right to ask all proper questions to attack the integrity of the exhibit.

Mr. Fennelly: I can tell your Honor my accountant tells me that is not so.

The Court: That may very well be, I don't know, but we will adjourn now until 2.15.

(Recess until 2.15 p.m.)

(1970) AFTERNOON SESSION

(Jury in box.)

WILFRED T. LEATH, resumed.

Cross Examination by Mr. Fennelly (Continued):

Q. Have you Exhibit 362, Mr. Leath? A. No, sir.

Mr. Pierpoint: 363 (handing)?

Mr. Fennelly: 3, I mean.

Q. (Hands to witness). A. Thank you.

Q. Mr. Leath, if I may take you back again on that item of adjustment for 1948— A. Yes, sir.

Q. I don't think we covered it fully.

The Court: That is 362, is it not?

Mr. Fennelly: Excuse me. No, 363, your Honor.

The Court: Is that on 363?

Mr. Fennelly: I first asked for the wrong exhibit.

The Court: Very well.

Q. In addition to the amount of 22,000 that we went over this morning there was an additional amount of a loss of 12,000 odd dollars, was there not? A. I believe the loss was 14,000. If I could see the return I could tell you exactly, sir.

Mr. Fennelly: May we have the return? I think (1971) it is exhibit—

The Court: For what year?

The Witness: 1948, sir.

Mr. Fennelly: '48.

Q. (Hands to witness). A. Thank you.

Q. That is the return you are looking at for 1948, Exhibit 2, right? A. Yes, sir. The return, Government's Exhibit 2, shows a bad debt, Crescent Music Company, $14,027.79.

Q. So the total amount that was written off as the loss was $36,027.79, and that amount was added back in your adjustment to the net worth; right? A. 36,027.79, yes.

Q. Right. Now, Mrs. Costello received from Crescent part of the money on that loan, did she not? A. The loan at the end of 1947 was $26,285.79; she received 12,000 odd dollars as partial repayment of the loan.

Q. As a partial repayment on the loan? A. Yes.

Q. And the balance of some 14, I think you said it was, was a loan to her? A. Yes, sir.

Q. Now, the money she received of some 12,000, I think it is, $258, she deposited in her bank account, did she not? A. I couldn't say without seeing the check, sir, for sure.

Wilfred T. Leath—for Government—Cross

(1972) Mr. Fennelly: Could I have Mrs. Costello's account, please?

Q. I give you Exhibit 43 (handing). A. Did you—

Q. Can you find it? A. I can see it. September 8, 1948. There is a deposit of $12,258.

Q. And that is the proceeds of the partial repayment of that loan; right? A. Well, the amounts are the same, sir.

Q. Now, Mrs. Costello had that money in her bank account therefor to spend; right? A. Yes, sir.

Q. Now, in your schedules you have charged all of the expenditures of Mrs. Costello to Mr., haven't you, in preparing them? A. We have given her—given Mr. Costello credit for the income that she reported, yes, sir.

Q. And you did not give her credit, for example, of this $12,258 which was deposited in her account on that day, did you? A. Yes, sir, we have, through the net worth statement, not specifically identified in here, but it is automatic through the net worth statement.

Q. And Mrs. Costello did have that money in her bank as spendable money, did she not? A. Yes, sir.

Q. And there was no tax due on it? A. No, it was a repayment of a loan.

(1973) Mr. Fennelly: Could I have the 1946 tax return, please?

Q. Now, you have just told us that you have given credit through this net worth business of yours here in these exhibits of this $12,258 deposited in Mrs. Costello's account, but isn't it a fact that you took and added the entire loss that Mrs. Costello had suffered in that year of some 36,000 odd dollars and you added back to her net worth? A. We added it to the change in net worth, sir.

Q. And that appears on your schedule that I have just

referred to, under, Exhibit 363, under the 1948 column, right? A. Yes, sir.

Q. Under your item "Adjustments"? A. Yes, sir.

Mr. Fennelly: Could I have the indictment, please?

Q. How much was the over-payment according, on income tax, according to the income tax return Exhibit 4 of Mr. Costello for the year 1946? A. 13—

The Court: Overpayment?

Mr. Fennelly: The overpayment.

A. $13,693.22.

Q. The overpayment made by Mr. Costello on his 1946 income tax return is more than the amount claimed in the indictment as tax due, isn't it? (1974) A. This money was refunded. It is more, yes, sir.

Q. In other words, Mr. Costello, in 1946, overpaid his income tax, according to his return, by more than the amount charged in the indictment as tax due, isn't that right? A. He said his tax was a certain amount and he had made more payments than that, which were later refunded.

Q. That is this sum of $13,693? A. That is right.

Q. And the sum charged in the indictment is $13,224.88? A. Yes.

Q. That figure I gave you is merely the overpayment of the tax and he had paid for the year some $22,000 in tax, hadn't he? A. The return shows that the tax liability was $8,338.72.

The Court: On the income reported?

The Witness: On the income reported, yes, sir.

Wilfred T. Leath—for Government—Cross

Q. How much had he paid, all in all? Wasn't it some $22,000? A. $22,031.94.

Q. Would you look at the exhibit, Mrs. Costello's bank account? I think that is Exhibit 43, is it? A. Yes, sir.

Q. What was the opening balance in the beginning of that year? Can you tell by looking at it? A. What year, sir?

Q. '49. A. Balance on December 31, 1948 or January (1975) 1, 1949 was $24,210.65.

Q. Will you tell me what her withdrawals were during the year? A. Total withdrawals?

Q. Yes. A. Take a little computing. I can do that.

Q. It would take very little, wouldn't it? A. Yes.

Q. Suppose you take the balance at the beginning of the next year. A. You want the withdrawals during '49 or '48 now?

Q. '49.

Mr. Leath, can't you very quickly arrive at it by taking the balance at the beginning of one period and the balance —and the deposits and deduct the amount left at the end? A. That is what I am doing, sir.

Q. Yes.

(A pause.)

A. The figure I arrive at, sir, is $18,986.01.

Q. Well, I make it very close to that, $18,958.34. But that is all right for the purpose I asked.

So that the fact is, even on that figure, that Mrs. Costello had at the opening of the year more money than all of her withdrawals for that year; in other words, she starts off the year with something over 24,000 and she withdrew 18,900 some dollars, is that (1975) right? A. Yes, sir.

Mr. Fennelly: Could I have Mr. Costello's account, please?

Wilfred T. Leath—for Government—Cross.

Q. I give you Mr. Costello's account, Exhibit 40, with the Corn Exchange Bank. Would you tell me what the opening balance is in that account in 1948? A. The last entry for '47 is December 3rd and the next entry is February 2, 1948, so the December 3rd balance was the same as January 1, 1948, was $62,356.48.

Q. And according to your schedule Exhibit D, what are—

The Court: 363-D.

Mr. Fennelly: Excuse me.

Q. 363-D, what are the expenditures for that year, as shown by your schedule? A. Year '48?

Q. That is right. A. $59,414.43.

Q. How much did you tell us was Mr. Costello's opening balance? A. $62,356.48.

Q. And these expenditures in here include Mrs. Costello's, don't they? A. Yes, sir.

Q. Now, have you the schedules or work sheets between the years 1938 through 1944? A. Yes, sir. '38 through '45.

Q. Well, you have something on '45 here I take it, (1977) yes; this goes up to December 31, 1945, your final figure, in Exhibit 362. A. This (indicating) goes with it.

Q. Well, I don't know anything about them; you just give me if you would, what you have on the subject matter of the items through those years. A. Sir, the work papers I have are similar to the final schedules.

Q. You have no work papers on the intervening years in connection with your schedule 362, between the year—the opening of it in 1937 and the closing date in 1945? A. I have work papers relative to the expenditures, sir.

Q. And nothing as to the receipts of money? A. No, sir.

Q. And transactions like the sale of the Southold property by Mrs. Costello? A. I didn't need work papers for those, sir, because those items are on exhibits that are in evidence.

Q. Nothing in your work papers reflect as to the transactions between, is that right? A. Not specifically reflected, sir, no, sir.

Q. Mr. Leath, did you testify before the grand jury in this case? A. Yes, sir, I did.

Q. And did you testify to anything contrary to (1978) what you have testified to here today?

Mr. MacMahon: Your Honor, I object to the form of that question.

The Court: Sustained.

Q. Now, when you testified before the grand jury, did you base your testimony on the exhibits and testimony that are in evidence here?

Mr. MacMahon: Your Honor, I object to that.
The Court: Sustained.

Q. Did you testify as to a sum total of expenditures—

Mr. MacMahon: Your Honor—

Q. —before the grand jury for the period from October 1937—

Mr. MacMahon: Your Honor, I object.

Q. —through 1949?

Mr. MacMahon: Your Honor, I object to that.
The Court: I will allow him to answer that.

A. My testimony, sir, before the grand jury was—

The Court: Why don't you answer the question you were asked?

Mr. Fennelly: Would you read the question?

(Question read.)

A. No, sir.

Q. Now, did you have Exhibit 362—

Mr. MacMahon: Your Honor, I object to the (1979) question.

The Court: Sustained.

Q. —before the grand jury?

The Court: I sustained the objection.

Q. Did you have any schedule as to net worth or expenditures before the grand jury when you testified?

Mr. MacMahon: Your Honor, I object to the question.

The Court: Sustained.

Q. Did you testify before the grand jury as to the amount of cash on hand that Mrs. Costello had on October 18, 1937?

Mr. MacMahon: I object to the question, your Honor.

The Court: Sustained.

Q. Did you testify as to the cash in banks of Mr. and Mrs. Costello on October 18, 1937, before the grand jury.

Mr. MacMahon: Your Honor, I object to the question.

The Court: Sustained.

Mr. Fennelly: If your Honor please, I would like the grand jury minutes for the purpose of cross examining this witness.

The Court: Do you move for their production?

(1980) Mr. Fennelly: Yes, your Honor, I move for their production.

The Court: The motion is denied.

Mr. Fennelly: And I offer in evidence the grand jury minutes which have been marked as Court's Exhibit 1, and I will request that your Honor—I don't think it has yet been done, that there is no identity of those minutes by the number of pages.

The Court: There is a statement on the record that, at the time the Court examined them—that is, at the time that the Court sealed them, they were in exactly the same condition as they were when first presented to the Court. I will not reopen them.

Your motion that I do so is denied.

Mr. Fennelly: Now, I now ask your Honor to yourself examine the grand jury minutes to determine whether or not Mr. Leath did testify contrary to his testimony here.

Mr. MacMahon: Your Honor, I—

The Court: I will reserve decision on that.

Mr. Fennelly: That is all, then, for the time being.

The Court: No. I will deny that motion unless you make some specifications with respect to it.

(1981) *By Mr. Fennelly:*

Q. Mr. Leath, did you testify before the grand jury as to any expenditure—

Wilfred T. Leath—for Government—Cross

Mr. MacMahon: Your Honor, I object.

Q. —by—

The Court: Wait until the question is finished.

Mr. MacMahon: I thought he had finished. I am sorry.

The Court: I direct the witness to withhold any answer until I have a chance to rule on any objection that may be made.

Q. Did you testify before the grand jury as to any expenditure made by Mr. Costello during the years 1938 through 1945 to Sylvia Leichner or her flower shop in the sum of $2,000 for each of those years?

Mr. MacMahon: Your Honor, I object to the form of the question.

The Court: Sustained.

Q. And did you base any testimony before the grand jury on any evidence of any such expenditure?

Mr. MacMahon: Your Honor, I object to the question.

The Court: Sustained.

Q. Did you include in any schedule before the grand jury any item of expenditure such as $2,000 per (1982) year from 1938 to 1945, as to which I have just asked you?

Mr. MacMahon: Your Honor, I object to the question as irrelevant.

The Court: Sustained.

Mr. MacMahon: And ask the Court to admonish counsel to discontinue that.

Wilfred T. Leath—for Government—Cross

Q. Now, did you testify before the grand jury as to any currency on hand—

Mr. MacMahon: Same objection.

Q. —by Mr. Mrs. Costello on October 18, 1937?

Mr. MacMahon: Same objection, your Honor.
The Court: Sustained.

Q. Did you base any testimony of yours—

Mr. MacMahon: Same—

Q. —on any evidence of currency on hand of $30,000 on October 18, 1937?

Mr. MacMahon: Same objection, your Honor.
The Court: Sustained.

Q. Did you testify as to any—the value of any investments of Mr. and Mrs. Costello on October 18, 1937?

Mr. MacMahon: Same objection.
The Court: Same ruling.

Q. And did you testify as to—with relation to any loans receivable to the Costellos on October 18, 1937?

(1983) Mr. MacMahon: Same objection, your Honor.
The Court: Sustained.

Q. Mr. Leath, isn't it a fact that in your testimony before the grand jury you made no reference and did not base any testimony on payments of $2,000 a year for the years 1938 to 1945 for flowers by Mr. Costello to Sylvia Leichner?